Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 98-204
Broadcast and Cable	)	
Equal Employment Opportunity	)	
Rules and Policies	)	
and	)	
Termination of the	)	MM Docket No. 96-16
EEO Streamlining Proceeding	)	

APPENDIX
to
Comments of UCC. et.al.

Office Of Communication, Inc., United Church of Christ,
National Council Of the Churches Of Christ In the U.S.A.,
Office of Communication,
Evangelical Lutheran Church in America
Presbyterian Church (U.S.A.)
United Methodist Church, Ecumenical Office
American Baptist Churches USA
Black Citizens for a Fair Media

in Support of Proposed Equal Employment Opportunity Rule

I. Proposed EEO Rules Are Appropriate and Necessary to Address Facially Neutral, But Discriminatory Employment Practices

The proposed rule is an appropriate and necessary offensive strategy for addressing a facially neutral, but ultimately discriminatory employment practice. A seemingly race-neutral employment practice which results in a substantial disparity

between the percentage of minorities and women in the qualified applicant pool and the percentage hired, may give rise to an inference of discrimination in hiring,[1] even in the absence of evidence of any subjective intent to discriminate.[2] A long-recognized type of apparently race-neutral, but discriminatory, employment practice is "recruitment discrimination." It is found when qualified and potentially interested job seekers are

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[1] NAACP v. Town of East Haven, 998 F. Supp. 176, 183 (D. Conn. 1998), citing Dothard v. Rawlinson, 433 U.S. 321 (1977). See generally, BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (3d ed., Vol. 1 697 (1996). (1996); FARRELL E. BLOCH, ANTIDISCRIMINATION LAW AND MINORITY EMPLOYMENT 28 (1994)(presenting an economic and statistical analysis of discrimination in employment). However, a Title VII plaintiff does not make out a case of disparate impact simply by showing that there is racial imbalance in the workforce. Instead, plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

[2] NAACP v. Town of East Haven, 998 F. Supp. at 183, citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645-46 (1989); Barnett v. W.T. Grant Co., 518 F.2d 543,549 (4th Cir. 1975)(word of mouth as the primary method of recruiting was discriminatory because it tended to perpetuate the all-white work force); EEOC v. Andrew Corp., 49 FEP 804, 819 (N.D. Ill. 1989)(more than half of referrals came from friends and relatives who were current employees); United States v. Village of Elmwood Park, 43 FEP 995, 997 (N.D. Ill. 1987)(exclusive use of word of mouth recruitment in an all white workforce was discriminatory); NAACP v. City of Corinth, 83 F.R.D. 46, 62, 20 FEP 1044 (N.D. Miss. 1979)(failure to advertise except by word-of-mouth was discriminatory); Franks v. Bowman Transp. Co., 495 F.2d 398, 419-20 (5th Cir. 1974), rev'd on other grounds, 424 U.S. 747 (1976)(employer's heavy reliance on word-of-mouth recruitment rebutted the employer's contention that the all-white composition of the office workforce was due to a lack of interest in those jobs among Blacks; court ordered the employer to advertise office vacancies through a medium specially designed to reach Blacks); Similar relief was ordered in Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792 (3d Cir. 1991); Waters v. Olinkraft, Inc., 475 F. Supp. 743 (W.D. Ark. 1979); In Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975)(the Fourth Circuit found that the recruitment by word-of-mouth was discriminatory because it tended "to perpetuate the all white composition of [the] work force." The employer's reliance on word-of-mouth recruitment was the more questionable where the evidence revealed that in the company's other division, it actively advertised and recruited, obtaining a racially mixed workforce).

not equally likely to discover employment opportunities because of personal characteristics unrelated to their qualifications for and interest in the jobs.[3] It occurs when an employer relies on word-of-mouth recruitment, which tends to replicate the current work force's racial and ethnic composition, thereby excluding others.[4] Thus, where statistics show that minorities are significantly underrepresented in the employer's workforce, an employer's exclusive or heavy reliance on word-of-mouth recruitment may become evidence of intentional discrimination.[5]

"Courts generally agree that [word-of-mouth] hiring is outweighed by the goal of providing everyone with equal opportunities for employment."[6] It is also the position of the EEOC that word-of-mouth referrals may be found to be discriminatory to the extent that they depend upon an employer's current workforce. The EEOC has stated that "[i]f that workforce

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[3] BLOCH, supra note 1, at 28.

[4] BLOCH, supra note 1, at 38. Roosevelt Thomas, et. al., The Practices on the Glass Ceiling, submitted to U.S. Department of Labor Glass Ceiling Commission, 14 (April 1994)(noting that recruitment practice primarily consist[ing] of word-of-mouth and employee referral networking ... promote the filling of vacancies almost exclusively from within).

[5] See Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972)(white employees found not to socialize with or know Blacks who might be qualified for available work); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 427 (8th Cir. 1970)(current employees tended to recommend their own relatives, friends, and neighbors for available work).

[6] Thomas v. Washington County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990); see also Robinson v. Lorillard Corp, 444 F.2d 791, 798, n.5 (4th Cir. 1971)(restrictions on union membership to relatives of current members was discriminatory); Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975); Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1303 (9th Cir. 1982); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1383 (4th Cir. 1972).

is, for example, almost entirely white, male or young, then word-of-mouth referrals will only reinforce the non-diverse nature of the workforce and discriminate against persons who are not white, male or young."[7]

Word-of-mouth recruitment is particularly pernicious because the workforce established through this type of recruiting becomes self-perpetuating. If the workforce is predominantly white or segregated, the effect of word-of-mouth recruitment may be to deprive minorities of information about openings, thereby perpetuating the racial composition of the workforce.[8] In the small firm, where the need for additional employees will be minimal and can be satisfied exclusively through personal referrals, because of the ethnic divisions within social networks, applicants and hires will come from the

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[7] Employer EEO Responsibilities: Preventing Discrimination in the Workplace, the Law and EEOC Procedures, by the U.S. EEOC, Technical Assistance Programs K-4 (1996).

[8] LINDEMANN & GROSSMAN, supra note 1, at 700; see also Thomas v. Washington County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990)(use of word-of-mouth operated to perpetuate the effects of past discrimination); EEOC v. Metal Serv. Co., 892 F.2d 341, 350-51 (3d Cir. 1990)(word-of-mouth recruitment where an all white workforce was strong evidence of discrimination); Domingo v. New England Fish Co., 727 F.2d 1429, 1435-36 (9th Cir. 1984), modified, 742 F.2d 520 (9th Cir. 1984)(use of whites to recruit by word of mouth resulting in all white workforce and giving preferences given to friends and relatives of existing employees was discriminatory, resulting in all white hirees); NAACP v. City of Evergreen, 693 F.2d 1367, 1369 (11th Cir. 1982)(employer's exclusive use of word-of-mouth operated to benefit whites and to reduce number of potential Black applicants); EEOC v. Detroit Edison Co., 515 F.2d 301, 313 (6th Cir. 1975)(discrimination in the practice of relying on referrals by a predominately white work force); Long v. Sapp, 515 F2d 34, 41 (5th Cir. 1974)(word-or-mouth recruitment served to perpetuate an all-white workforce); U.S. V. Georgia Power Co., 474 F.2d 906, 925 (5th Cir. 1973); Franks v. Bowman Transp. Co. 495 F.2d 398 (5th Cir. 1974).

same ethnic group.[9] Similarly, as the firm grows and the need for new hires increases, the larger work force, and perhaps an expanding number of customers and business associates, will provide a network large enough to generate the required number of applicants, most or all of whom will be referred by and are themselves members of the owners' ethnic group.[10] Even when a firm grows to a size where recruitment beyond personal referrals is necessary, it may consciously or inadvertently seek to replicate the racial or ethnic composition of their current employees on the explicit or implicit ground that employee cooperation, and therefore productivity, will be greater with an ethnically homogeneous work force. Employers will thus recruit by advertising job openings with religious, fraternal, or community organizations to which their employees or individuals ethnically similar to them and are likely to belong, or by placing ads in ethnic or community newspapers targeting the same groups.[11]

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[9] BLOCH, supra note 1, at 38.
[10] BLOCH, supra note 1, at 38.
[11] Id. Word-of-mouth recruitment thus "taints" an employer's applicant pool, making it an inappropriate and unreliable measure of minority availability.

Minorities may discover and respond to job announcements more slowly than whites, even if a job vacancy is advertised in the major area daily newspaper, where it is known in advance by current employees, and most or all of the current employees are white, their word-of-mouth networks will tend to reach mainly other whites, who will be able to respond early, perhaps by submitting applications on the morning the ad appears in the newspaper. And if the number of applications is sufficiently large, employers may process only those submitted earliest, thus potentially freezing out minority applicants. At the same time, minorities will also respond more slowly if they live farther from work sites than whites, a situation obtaining

Other employment practices which may lead to a finding of discrimination include the exclusive reliance on particularly limited sources of applicants where these sources do not produce a diverse applicant pool.[12] Thus, heavy reliance on walk-in applications may be discriminatory because such a practice can artificially restrict the applicant pool to the employer's immediately surrounding geographical area (which may be a largely racially homogenous area) and to those who hear of job openings through word-of-mouth.[13]

Recently, in U.S. v. City of Warren,[14] the Sixth Circuit found that an employer's practice of advertising for job vacancies only in the predominantly white county and refusing to advertise in the more heterogeneous Detroit city, and the employer's requirement of residency by applicants, was racially discriminatory. There, the United States alleged among other

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particularly for inner-city Blacks and Hispanics facing increasing suburbanizations of employment. They will not as quickly discover vacancy announcements in windows, or ads on bulletin boards near employers or in local newspapers serving that area. BLOCH, supra note 1, 46.

[12] LINDEMANN & GROSSMAN, supra note 1, at 707-08. For example, in EEOC v. N.Y. Times Broadcasting, Inc., 542 F.2d 356, 360-61 (6th Cir. 1976), the Sixth Circuit held that a television station engaged in unlawful hiring practices when it recruited broadcast news personnel solely from two radio stations that had employed virtually no women in such positions.

[13] LINDEMANN & GROSSMAN, supra note 1, at 707. Conversely, an employer's refusal to accept walk-in applications may establish a prima case of discrimination. Id. at 708, citing Furnco Construction Corp. v. Waters, 438 U.S. 567, 576-78 (1978)(holding employer's refusal to consider the qualifications of "walk-in" applicants, including many African-Americans, because it believed that applicants recruited otherwise were more likely to be experienced and competent, established a prima facie case of discrimination).

[14] 138 F.3d 1083 (6th Cir. 1998).

things, that the city's recruitment and selection of municipal employees had a disparate impact on Blacks, that the city treated Black applicants for employment differently than it treated similarly situated whites and that the city had failed to correct the effects of its unlawful discriminatory policies and practices.[15] In particular, the evidence showed that the city recruited firefighters and police by posting both positions at local universities and colleges and advertising in McComb County publications, but not in Detroit city newspapers.[16]

The district court found discrimination by comparing the number of Black applicants for police and firefighter positions before and after the change in policy, when the City began advertising police and firefighter employment outside McComb County. The statistical difference indicated that the advertisement indeed had a disparate impact on Black potential employees.[17] The district court enjoined the city from engaging in the discriminatory recruitment practices with respect to the

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[15] 138 F.3d at 1088-89. The District Court found "gross statistical disparities" of 10.3 standard deviations between the number of Black employees that the city employed and the expected number of Black employees, basing its findings on the number of Black workers in the Detroit metropolitan area civilian labor force and among private employers in the city, as well as on the city's applicant flow data after 1986. Id.

[16] Id. at 1088. However, by the time of suit, the city had changed its practices to advertise in Detroit city papers. The district court ruled that the Department of Justice failed to meet its burden on the hostile work environment claim and the claims arising after the change in policy.

[17] Id. at 1089.

police and firefighter positions.[18] However, the district court ruled that the United States had presented no statistical evidence that isolated the discriminatory effect of the recruiting practices on other municipal positions.[19]

On appeal, the Sixth Circuit affirmed the district court's finding of discrimination in the case of police and firefighter positions, but held that the district court erred in its other finding. The court pointed out that the Supreme Court has long-held that Title VII proscribes both overt discrimination as well as "practices that are fair in form, but discriminatory in operation."[20] In this case, the United States' inability to isolate the specific reason for the dearth of Black applicants was not fatal to its claim. The United States offered evidence that the earlier refusal to advertise police and firefighter job openings outside of the predominantly white McComb County resulted in a practically all-white applicant pool for those positions and that the racial composition of the pool changed after the city changed its practice.[21] The United States did not produce a statistical analysis of the impact of the City's refusal to advertise municipal positions other than police or

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[18] Id. at 1089. Thereafter, the city expanded its recruiting efforts by advertising in newspapers with a primarily Black readership in which the city previously had refused to advertise.
[19] Id. at 1089.
[20] Id. at 1091, citing Briggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
[21] Id. at 1092.

firefighters positions outside McComb County because the City's advertising policy, combined with its preapplication residency requirement for all municipal employees until the advertising policies were changed, rendered such an analysis meaningless.[22] Moreover, the Sixth Circuit explained, the leading Supreme Court case on the issue, Wards Cove Packing Co. v. Atonio,[23] does not require the United States to isolate and quantify the effects of the City's discriminatory employment practices simply because the practices, both of which the district court held to be unlawful, converged to discourage Black applicants.[24] Indeed, the court stated, the result would be anomalous and contrary to Wards Cove's explicit recognition that when, as here, certain employment practices obscure labor market statistics, alternative statistical analysis suffices to establish a prima facie disparate impact case.[25]

Finally, the court ruled, the city's assertion that disparate impact analysis is inapplicable to recruiting

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[22] Id. at 1093.
[23] 490 U.S. 642.
[24] Id. at 1094. While the district court interpreted absence of evidence as to the positions other than police and firefighters to mean the United States had failed to meet its burden, this interpretation was inconsistent with an earlier determination by the court that the recruiting practices for police and firefighters positions had a disparate impact on Blacks. In that earlier ruling, the district court noted that the City's recruiting methods were substantially the same for all municipal job opportunities. The law of case rules required that for consistency and to avoid reconsideration of matters once decided during the course of a single continuing lawsuit, the earlier ruling should stand. Accordingly, the district court's later ruling was clearly erroneous. Id.
[25] Id. at 1094.

practices is "plainly incorrect." In fact, the very purpose of Title VII's disparate impact theory is to "eradicate...barriers which discriminate on the basis of race, gender, religion, and other protected classifications."[26] "[The City's] limitation of its applicant pool to residents of the overwhelmingly white city, combined with its refusal to publicize jobs outside the racially homogenous county, produced a de facto barrier between employment opportunities and members of a protected class. A plaintiff need not identify a sign reading 'No Blacks Need Apply' before invoking Title VII."[27]

A. Chilling Effect From Discriminatory Recruitment Practices

Related to recruitment discrimination and as a secondary result, is the phenomenon known as the "chilling effect", which with almost equal force, works to exclude minorities and women from employment opportunities.[28] The chilling effect can arise from overt acts of discrimination that directly discourage, like routinely turning away minority applicants, and also from more subtle and unintended practices, such as having a sex-segregated

[26] Id. at 1094, citing Zemlen v. City of Cleveland, 906 F.2d 209, 216 (6th Cir. 1990).
[27] Id. at 1094.
[28] NAACP v. Town of East Haven, 998 F. Supp. at 184, citing Wards Cove Packing v. Atonio, 490 U.S. at 657; Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 (1988).

workforce,[29] never having hired Blacks,[30] having residency requirements in a community where racial minorities do not reside,[31] all of which create a reputation that the employer discriminates, which in turn deters other potential minority applicants.[32]

A recent case from the District of Connecticut found unlawful racial discrimination based on the "chilling effect". In NAACP v. Town of East Haven,[33] the plaintiff, ("NAACP") alleged racial discrimination in the defendant's practice of hiring employees for town jobs without a thorough and effective outreach program and this practice was responsible for a "perceived animus" against Blacks, which discouraged them from applying for jobs.[34] The NAACP showed that over a period of more

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[29] Kohne v. IMCO Container Co., 480 F. Supp. 1015, 1037 (W.D. Va. 1979)(sex-segregated industry discouraged potential female applicants).

[30] EEOC v. Peterson, Howell & Heather, Inc., 702 F. Supp. 1213, 1227-28 (D. Md. 1989)(evidence showing employer had reputation for discrimination sufficient to defeat summary judgment); United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 559 (W.D.N.C. 1971)(employer with all-white workforce gave discriminatory reputation); Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D. N.C. 1969)(discriminatory reputation discouraged Blacks from applying), aff'd in relevant part, 438 F.2d 86, (4th Cir. 1971); cf. Babrocky v. Jewel Food Co., 773 F.2d 857, 867 (7th Cir. 1985)(... employer filled positions through union hall and union never recommended female members, such plaintiff need not have filed an application to have a cause of action); Draper v. Smith Tool & Eng. Co., 728 F.2d 256, 256-57 (6th Cir. 1984)(discrimination found where employer had never hired a Black and failed to hire a qualified Black applicant).

[31] See e.g., Mister v. Illinois Cent. Gulf R.R. Co., 832 F.2d 1427, 1431-35 (7th Cir. 1987)(residency rules may have chilling effect on Black applicants); Kilgo v. Bowman Transp. Inc., 570 F.Supp. 1509, 1517 (N.D. Ga. 1983)(defendant's requirement of one year's experience in over-the-road driving was more likely to dissuade women than men from applying).

[32] See generally, LINDEMANN & GROSSMAN, supra note 1, at 711-12.

[33] 998 F. Supp. 176.

[34] Id. at 184.

than a decade, the town employed no Blacks in its civil service workers and of its school teachers, none was Black.[35]

The court held that the plaintiffs had made out a prima facie case of discrimination as the discrepancies between employment of Blacks and that of whites went far beyond the statistical deviations necessary to draw an inference of race having been a factor,[36] and so large as to overcome the innocuous explanation for the discrepancy.[37] In the court's view, the Town's argument that there was no showing of any discriminatory treatment of any Black applicant and its explanation, (i.e., lack of qualified Black applicants who successfully passed race neutral screening) missed the point. The argument did not relate to the necessity to overcome the Black community's negative perception of the town's hiring practices with an effort calculated to produce what the Town asserted it sought, i.e., a reasonable number of qualified Black applicants such that more Blacks will pass the application procedures and be ranked high enough to be hired.[38] Indeed, it was the paucity of qualified Black applicants that proved the plaintiff's point.[39]

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[35] Id. at 178. There were only a few Blacks in positions such as messenger, part-time coach, part-time tutor, teacher's aide.
[36] Id. at 185.
[37] Id.
[38] Id.
[39] Id. at 186.

The court concluded that the N.A.A.C.P. had proven that Blacks were not being hired because they were discouraged by the hiring process and found that a "remedy which overcomes or tends to neutralize race as a lurking element was warranted" and that even in the absence of any affirmative conduct of a discriminatory nature, "recruiting (or non-recruiting) which has a discriminatory effect is not an improper basis for relief."[40] The relief sought and granted required that an outreach program which would overcome the inhibitions which have discouraged qualified Blacks from seeking town employment in numbers representative of the makeup of the Black community.[41] The court stated: "[t]his is in keeping with the prophylactic objective of Title VII, which is to 'achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees."[42]

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[40] Id. at 187.

[41] Id.

[42] Id. While the Supreme Court has never established a bright line test by which to judge the significance of a statistical disparity, it has stressed that statistical disparities must be substantial enough to suggest that minorities are being excluded from consideration because of factors related to race. See also Watson v. Fort Worth Bank & Trust, 487 U.S. at 995. The Supreme Court has held that a fluctuation of more than two or three standard deviations would undercut the presumption that decisions were being made randomly without regard to race. See Castenada v. Partida, 430 U.S. 482, 495-96 (1977). Evidence that particular employment practices have dissuaded minorities from applying for jobs or accepting offers can serve to buttress statistical disparities on which the use of racial criteria in employment decisions is predicated. See Justice Department Memorandum, Proposed Reforms to Affirmative Action in Federal Procurement, 1996 DLR 100 d22, May 23, 1996 ("DOJ Memmo").

II. Constitutionality of Proposed EEO Rule: Standards for Evaluating Classifications in Equal Protection Analysis

A racial or gender classification as would serve as a predicate for an equal protection constitutional claim requires a showing that a governmental standard authorizes or encourages preferences in the distribution of benefits based on race or gender.[43] The Supreme Court has made clear that systems or standards setting rigid quotas,[44] as well as those involving non-rigid goals,[45] may be subject to challenge as an impermissible racial classification.

That a classification is race-based does not by that distinction alone condemn it. To the contrary, racial classifications or race-conscious preferences may be upheld, but must pass the strict judicial scrutiny.[46] In this inquiry, it must be shown that the interest sought to be advanced by the government standard is a compelling one and that the means chosen to further that end is narrowly tailored.[47] Voluntary acts to remedy past instances of discrimination against

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[43] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)("Adarand")(statute giving special incentives to government contractors to hire minority subcontractors, established a racial classification).
[44] City of Richmond v. J.A. Croson, 488 U.S. 469 (1989)("Croson").
[45] 515 U.S. at 228.
[46] 515 U.S. at 202; 488 U.S. at 472. Gender-based classifications, on the other hand, are subject to less exacting intermediate scrutiny. See Lamprecht v. F.C.C., 958 F.2d 382 (D.C. Cir. 1992).
[47] 515 U.S. at 227.

minorities are compelling governmental interests.[48] Similarly, racial and ethnic diversity in certain workforce contexts are compelling governmental interests.[49]

On the other hand, where a governmental standard does not establish a racial classification or otherwise create or authorize preferences based on race, the scrutiny required for its validity is considerably less exacting. All that need be shown is that there is a rational basis for the governmental interest.[50]

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[48] 515 U.S. at 237-38; 488 U.S. at 492.

[49] Such contexts include police forces to the extent a diverse force will facilitate the development of a better relationship with the community and thereby improve law enforcement. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 314 (1986); U.S. v. Paradise, 480 U.S. 149, 167, n.18; Detroit Police Officers' Assoc. v. Young, 608 F.2d 671, 696 (4th Cir. 1979)

[50] While the adoption of an equal employment opportunity rule, must accord with the decision in Lutheran, it must also be guided by the earlier pronouncements of the Supreme Court. In this respect, the implications of Adarand, are both broad and narrow. Significantly, Adarand can be read as a rejection of any notion of per se unconstitutionality of race-based affirmative action measures undertaken by the federal government. In fact, the Court did not decide the constitutionality of the program at issue in the case, but simply remanded for a determination whether the program satisfied strict scrutiny. Thus, no affirmative action program was held unconstitutional. While it must be acknowledged that Adarand overruled Metro Broadcasting, it did so only in part, that is, with respect to the earlier holding that benign federal affirmative action programs are subject to intermediate scrutiny. The Adarand court did not explicitly overrule the judgment in Metro Broadcasting. In other words, the Adarand court did not decree that the Commission's form of discrimination based on diversity, not remedial action, would necessarily fail under a review of strict scrutiny. Instead, Justice Stevens, with whom Justice Ginsberg joined in dissent, pointed out that: "[t]he majority today overrules Metro Broadcasting only in so far as it is 'inconsistent' with [the] holding' that strict scrutiny applies to 'benign' racial classifications promulgated by the federal government. . . .[citation omitted]. The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today -- indeed, the question is not remotely presented in this case -- and I do not take the Court's opinion to diminish that aspect of our decision in Metro Broadcasting." 515 U.S. at 240. Nothing in Adarand says that the prospective diversity-in-programming rationale (as opposed to past discrimination-remedial rationale), accepted by

A. Opportunity-Enhancing Requirements are Race-Neutral and Do Not Implicate the Constitution

The proposed rules are opportunity-enhancing measures. They prescribe outreach and recruitment aimed at expanding the applicant pool to include qualified racial minorities and women. Such opportunity-enhancing measures have long-been regarded by the courts as race-neutral.[51] This is so even though an employer

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the Court in Metro Broadcasting, was not still a valid justification for racial preferences in federal programs. Furthermore, Adarand left open the question whether, even under strict scrutiny, Congressionally authorized affirmative action measures undertaken by federal agencies are entitled to particular deference from the courts, given Congress' broad powers to remedy discrimination. Thus, despite the Lutheran court's clear hostility toward race-conscious programs, the narrowness of the Adarand holding leaves considerable room for the Commission to adopt both past discrimination remedial measures and forward-looking diversity of perspective measures. See generally Girardeau A. Spann, Affirmative Action and Discrimination, 39 How. L. J. 1 (1995). Nonetheless, as we discuss below, the proposed rules are not race-conscious, but race-neutral.

[51] See Lutheran, 141 F.3d at 351; see also Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1553, 1557-58 (11th Cir. 1994)(recruiting programs to provide information and to solicit applications from minorities and women for firefighting positions, other outreach programs and attendance at job fairs and career days at local colleges designed to apprise minorities and women of career opportunities were race-neutral); Billish v. City of Chicago, 962 F.2d 1269, 1290 (7th Cir. 1992), vacated on other grounds, 989 F.2d 890 (7th Cir.)(en banc), cert. denied, 114 S.Ct. 290 (1990)(recruiting programs would be race-neutral means of increasing minority presence); Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994)(minority recruitment and application fee waivers were "race-neutral"); Shuford v. Alabama State Bd. of Educ., 897 F. Supp. 1535, 1553-54 (M.D. Ala. 1995), cert. denied 502 U.S. 1074 (1992); Alschuler v. HUD, 515 F. Supp. 1212, 1234 (N.D. Ill. 1981)(affirmative marketing plan to ensure all racial groups have knowledge of and opportunity to rent housing in particular building was race-neutral), aff'd 686 F.2d 472 (7th Cir. 1982).

In a 1996 memorandum by the Department of Justice to general counsels of federal agencies to provide guidance on the use of affirmative action in federal employment in a manner consistent with Adarand, the Department advised agencies that Adarand does not apply to actions in which race is not used as a basis for making employment decisions about individuals. This means that actions taken to increase minority applications is not subject to Adarand. Similarly, programs designed to make minority firms aware of contracting opportunities and to help them take advantage of those opportunities are constitutional and as they involve race-neutral criteria, these activities were not subject to strict judicial scrutiny. See Justice

is consciously acting to increase the number of applications from racial minorities and women.[52]

The recent First Circuit opinion in Raso v. Lago,[53] is instructive. There, the issue on appeal was whether a HUD requirement[54] that a housing developer, as a condition of funding, adopt and carry out an affirmative program to attract minority as well as majority applicants,[55] including mailings to minority organizations and making assurances of nondiscrimination,[56] violated equal protection principles because it established a forbidden racial classification.[57] The new housing was intended to replace demolished old housing and under a state statute, those displaced tenants would have been entitled to preferences in the selection of tenants for the new housing. In order to carry out the required affirmative program, it was necessary to eliminate some of the statutory preferences.[58]

Department Memorandum, Proposed Reforms to Affirmative Action in Federal Procurement, 1996 DLR 100 d22, May 23, 1996.

[52] Raso v. Lago, 135 F.3d 11 (1st Cir. 1998); see also Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1557-58 (11th Cir. 1994)(presentations at job fairs and career days designed specifically to apprise minorities of career opportunities deemed to be race-neutral)

[53] 135 F.3d 11 (1st Cir. 1998).

[54] Id. at 14.

[55] Id. at 13.

[56] Id. at 13-14.

[57] Id. at 15.

[58] The city was also operating under a consent decree. The consent decree was based on a finding that HUD had failed to meet statutory obligations to ensure that the minority population of Boston had equal access to public housing, and provided that all Boston area HUD affirmative fair housing marketing plans "shall have as their goal and measure of success the

The court held that the affirmative plan did not create a suspect racial classification. The court explained that a "racial motive" or a racial purpose or goal is not synonymous with a constitutional violation.[59] Indeed, "[e]very anti-discrimination statute aimed at racial discrimination and every enforcement measure taken under such a statute, reflect a concern with race. Such race-conscious purposes do not make enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause."[60] According to the court, a governmental action is suspect if it has been taken on the basis of a "racial classification." In this case, no facts were alleged as would support a finding of "racial classification."[61] Instead, under the affirmative marketing plan, apartments freed from the statutory preferences were made available to all applicants regardless of race.[62] All that the plan did was to ensure equal treatment of applicants regardless of race. As the provider of the funds for the housing, the government had the

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achievement of a racial composition, in HUD-assisted housing located in neighborhoods that are predominantly white, which reflects the racial composition of the city [of Boston] as a whole." Id. at 14. After mediation between the non-profit organization representing former tenants and the developers, the mediator proposed that former tenant's would receive a preference as to 55% of the units and "all other applicants would have equal access to the remaining 45%. The former tenants did not agree. The tenant selection process was otherwise by lottery. The former tenants sued arguing that they were deprived of their statutory preferences for all the apartments based upon "a racial classification."

[59] 135 F.3d at 16.

[60] Id.

[61] Id.

[62] Id.

right to insist, as a condition of this investment, that a fair number of the apartments should be open to application by tenants of all races.[63]

The court went on to distinguish Adarand as being almost the opposite of the case under consideration. In Adarand, the Court explained, the statute gave special incentives to government contractors to hire minority subcontractors.[64] Here, the government required that recipients ensure that some of the apartments -- which otherwise would have almost automatically been occupied by whites -- be made available to all applicants on a race-blind basis."[65]

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[63] Id.

[64] Id. at 17, citing 515 U.S. at 205-06; 488 U.S. at 493-94.

[65] 135 F.3d at 17-18. See also South Suburban Housing Center v. Greater South Suburban Bd. of Realtors, 935 F.2d 868, 884 (7th Cir. 1991). There, the plaintiff was a non-profit corporation formed to promote and encourage multi-racial communities. It was engaged in a program of "affirmative marketing" of real estate, which consisted of race-conscious efforts to promote integration or prevent segregation, through special marketing of real estate to attract persons of particular racial classifications who were not likely to either be aware of the availability or express an interest in the real estate without special efforts. The affirmative plan adopted by plaintiff required "best efforts to attract minority and majority group persons", placing advertisements in newspapers calculated to reach an audience of [the other race], distribution of information to "selected" organizations and employers designed to reach the other race. The plan also required brokers to keep a record of the race of the persons shown a home. Id. at 884. The court held the program of directing information to predominantly white audiences did not violate the Fair Housing Act. The affirmative marketing plan in no way deterred Blacks, but "merely create[d] additional competition in the housing market". Id. at 883. Similarly, in Duffy v. Wolle, 123 F.3d 1026 (8th Cir. 1997), the Eighth Circuit ruled that "[a]n employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination." Id. at 1038-39. The court explained that the reasons for an inclusive recruitment effort are two-sided -- it enables employers to generate the largest pool of qualified applicants, and it helps to ensure that minorities and women are not discriminatorily excluded from employment. 123 F.3d at 1039. In the court's words, "[t]his [inclusive recruitment] not only allows employers to obtain the best possible employees, but it 'is an

In Allen v. Alabama State Board of Education,[66] in an action to vacate a consent decree, the plaintiffs argued that certain "race-conscious" requirements of the consent decree, particularly the requirement that the State Board of Education be conscious of race in developing teacher certification tests, established a racial classification that could not survive strict scrutiny. The requirement was adopted to "minimize any racially disparate impact within the framework of designing a valid and comprehensive teaching examination."[67] The Eleventh Circuit held that "[n]othing in Adarand require[d] the

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excellent way to avoid lawsuits.'" Id. at 1039. Moreover, inclusive recruitment creates no adverse impact on those who had traditionally been included in the applicant pool. "The only harm to white males is that they must compete against a larger pool of qualified applicants. This, of course, 'is not an appropriate objection.'". Id. at 1039; Compare Monterey Mechanical Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997), where the court struck down a state statute which required general contractors to subcontract a specific percentage of the work to minority, women, and disabled veteran owned subcontractors, or having failed to so subcontract, in the alternative, to demonstrate "good faith" efforts to do so. Id. at 704. The court ruled that this was not a non-discriminatory outreach program merely requiring that advertisements for bids be distributed in such a manner as to assure that all persons, including women-owned and minority-owned firms, have a fair opportunity to bid, because it treated contractors differently according to their ethnicity and sex, with respect to the "good faith" requirement. In particular, the statute required bid solicitation in the context of requiring "good faith efforts" to meet the percentage goals; required the distribution of information only to members of designated groups, without any requirement or condition that persons in other groups receive the same information; and permitted bidders in the designated groups to avoid the subcontracting percentages and good faith efforts to the extent they kept the required percentages or work themselves. Nonetheless, the court said if the statute had said "that all contractors must assure the opportunity to bid is advertised to all prospective contractors, including minority-owned and women-owned firms", it would have been upheld. Id. at 711. The proposed rule avoids the infirmities identified in Monterey Mechanical in that all regulatees are subject to the same requirements and nothing in the proposed rule requires any hiring in order to meet any percentage goals.

[66] 1999 WL 8015 (11th Cir. 1999).

[67] Id. at *6.

application of strict scrutiny to this sort or race-consciousness."[68] Indeed, "to do so would imperil Title VII, which requires covered employers to ensure that their selection processes do not result in an unjustifiable discriminatory impact on African-American candidates."[69]

B. Recruitment and Outreach Requirements of Proposed Rule are Consistent with Existing Court Rulings

Under the existing state of the law, an EEO rule may lawfully require regulatees to engage in recruitment of and outreach to minorities and women. A recruitment and outreach program may require:

1. contact with race- and gender-specific organizations or sources.[70]

2. advertising of job vacancies in media likely to reach

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[68] Id at *6. The court pointed out that while "Adarand's strict scrutiny standard is plainly applicable where the government distributes burdens or benefits along racial lines, granting a preference or imposing a penalty to individuals because of race", "[b]y contrast, where the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race, broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable." Id. at *5, citing Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1557-58 (11th Cir. 1994); Shuford v. Alabama State Bd. of Educ., 897 F. Supp 1535, 1551-52 (M.D. Ala. 1995).

[69] Id. at *6.

[70] Raso v. Lago, 135 F.3d at 13-14; South Suburban Housing Center v. Greater South Suburban Bd. of Realtors, 935 F.2d at 873; Monterey Mechanical Co. v. Wilson, 125 F.3d at 710; Peightal v. Metropolitan Dade County, 26 F.3d at 1557.

minorities.[71]

3. advertising and/or recruiting at and/or attending job fairs at educational institutions having a predominantly minority enrollment.[72]

4. establishing recruitment methods that do not rely exclusively or predominantly upon word-of-mouth referrals or walk-in applications.[73]

5. collecting data on the race and gender of applicants for employment.[74]

6. engaging in self-assessment and review of existing recruitment and hiring programs.[75]

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[71] U.S. v. Warren, 138 F.3d 1083 (6th Cir. 1998); South Suburban Housing Center v. Greater South Suburban Bd. of Realtors, 935 F.2d 868, 884 (7th Cir. 1991).

[72] Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994).

[73] See discussion of recruitment discrimination at text accompanying notes 1 through 42.

[74] 935 F.2d 868. It is well-settled that data as to the race and gender of applicants is relevant and may be sufficient to establish statistical disparities in hiring to prove intentional discrimination. Watson v. Fort Worth Bank & Trust, 487 U.S. 977; Castenada v. Partida, 430 U.S. 482, 495 (1977); see also U.S. v. Warren, 138 F.3d 1083 (6th Cir. 1998); Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1553, 1557-58 (11th Cir. 1994)("to successfully meet the factual predicate under the compelling interest inquiry, statistical comparison between the employer's workforce and the composition of the relevant population are probative of a pattern of discrimination"). As the NTIA stated in its 1998 report, "[e]nsuring a diversity of viewpoints is a cornerstone of our nation's broadcast policy. The continuing and emerging trends in minority commercial radio and television are chipping away at a valuable, indeed essential, means of achieving this goal and our nation's historic commitment to localism. The collection of data on minority ownership is a critical first step to identifying new policy initiatives that promote greater minority ownership of broadcast properties, which will in turn enrich our marketplace. Minority Commercial Broadcast Ownership in the United States, U.S. Dept. of Commerce, National Telecommunications and Information Administration (1998). ("NTIA Study").

[75] See discussion of recruitment discrimination at text accompanying notes 1 through 42. The Department of Justice has advised federal agencies to

III. EEO Rule is Necessary to Ensure that the Tastes and Viewpoints of Minority Groups are not Excluded from Programming

Under its enabling legislation, the Commission has the duty to ensure that broadcast facilities and cable systems operate in the public interest.[76] This duty has been interpreted to require the Commission to ensure that its regulatees serve all segments of the community.[77] An EEO rule designed to require efforts to include minorities and women will achieve this objective.[78] There

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regularly examine their recruitment practices to ensure that they are effective and productive and should determine whether minority applicants have been deterred as a result of past discriminatory practices or the agency's reputation for discrimination, whether deserved or not. In the Department's view, Adarand does not preclude tracking minority participation in the agency's workforce through the collection and maintenance of statistics or the filing of reports with the EEOC. The Department also has taken the position that other actions such as reviewing qualification standards to ensure that unnecessary criteria that have a disproportionate impact on minorities are eliminated, are race-neutral. Similarly, an employer might define selection criteria in ways that give an applicant credit for overcoming social and economic disadvantage, which may include barriers posed by discrimination based on race or ethnicity, so long as race or ethnicity is not used to define social and economic advantage. See DOJ Memo.

[76] Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966); NAACP v. FPC, 425 U.S. 662 (1976); Office of Communication v. FCC, 560 F.2d 529 (2d Cir. 1976).

[77] Id.

[78] At the time the first EEO Rule was adopted, there was a striking absence of authentic voices from minority communities in news and entertainment programming and this state of affairs was poignantly made by the race riots of the mid-1960's. See Daniel L. Brenner, Ownership and Content Regulation in Merging and Emerging Media, 45 DePaul L. Rev. 1009, 1020-21 (1996), citing Report of the U.S. National Advisory Commission on Civil Disorders (1968) ("Kerner Commission Report"). The Kerner Commission Report identified systemic racial exclusion in news and entertainment programming. It also noted that Blacks were largely neglected on television and recommended they be included in all forms of television programming. The report proposed the establishment of a private, nonprofit entity to carry out its recommendations to address these problems. However, more than three decades later, the state of affairs is largely unchanged. Brenner, supra at 1021.

is ample support for this position in the social science literature. Many studies have considered the significance of race and gender in society on the behaviors and attitudes of the various groups as distinguished from another and on the interaction between groups. These studies show that to a significant extent, race explains cultural differences between whites and Blacks.[79] That is, people who differ in race have different socialization patterns, come from different backgrounds, possess different values.[80] Significantly, studies show that differences in views and experiences between racial groups often cut across class lines.[81] Fundamentally, social

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[79] T. Alexander Aleinikoff, A Case for Race-Consciousness, 91 Colum. L. Rev. 1060, 1080 (June 1991), citing T. Kochman, Black and White Styles in Conflict 8 (1981); S. Heath, Questioning at Home and at School: A Comparative Study, in Doing the Ethnography of Schooling: Educational Anthropology in Action 105, 110 (G. Spindler, ed. 1982).

[80] A.K. Foeman & G. Pressley, Ethnic Culture and Corporate Culture: Using Black Style in Organizations, 35 Communication Q. 101-118 (1987). The arguments made by the social scientists and here cannot fairly be dismissed as reductionist to the point of isolating the "stereotypical" Black, since the point is not that race determines viewpoint, but only that race is relevant to viewpoint. In any case, social science research suggests that stereotypes serve as powerful heuristics, supplying explanations for events even when evidence supporting nonstereotypical explanations exists, and leading us to interpret situations and actions differently when the race of the actors varies. See Aleinikoff, supra note 79, at 1068, citing Bodenhausen & Wyer, Effects of Stereotypes on Decision Making and Information-Processing Strategies, 48 J. Personality & Soc. Psychology 267, 267-82 (1985); Sagar & Schofield, Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts, 39 J. Personality & Soc. Psychology 590, 590-98 (1980).

[81] See R. FARLEY & W. ALLEN, The Color Line and the Quality of Life in America 148-50 (1987)(Black/white residential segregation significant at every economic level); See Aleinikoff, supra note 79, at 1060, citing A COMMON DESTINY: BLACKS & AMERICAN SOCIETY 3-32 (G. Jaynes & R. Williams, Jr. eds. 1989)(alienation of Blacks from white society not concentrated within any particular segment of the Black community).

In attitudes about the law and the judicial system, a recent study conducted by the American Bar Association Journal and the National Bar

scientists describe "race-consciousness as an entrenched structure of thought that affects how we organize and process information.[82]

The differences in the views and experiences of whites and Blacks will manifest themselves in the broadcast programming choices by those in a position to select which programs to air and by viewers in selecting which programs to view.[83] The most

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Association Magazine revealed a stark contrast in the perceptions of Black and white lawyers on fairness of the system when it comes to Blacks. The report showed that more than half of Black lawyers in the survey, when asked how much racial bias exists in the justice system, answered "very much", while nearly a third of the white lawyers answered "very little," although more than half said there was "some." Terry Carter, Divided Justice, 85 A.B.A. J 42, 43 (Feb. 1999). Two-thirds of the Black lawyers said they had witnessed racial bias in the justice system in the past three years, while more than 80 percent of the white lawyers said they had not. Nearly all the Black lawyers, about 92 percent, said that, compared to other segments of society, the justice system has the same amount of racial bias or more, while nearly half the white lawyers believe there is less. Black lawyers would be more willing to allow minority individuals to use civil rights laws to sue governments over decisions that permit environmental polluters to operate in their neighborhoods (Blacks 82.8% to whites, 42.1%). Black lawyers are significantly more likely to say they have seen an attempt to skew a jury racially because of the race of the defendant (Blacks, 51.7% and whites, 22.4%). Black lawyers overwhelmingly see race as a major reason the U.S. Senate Judiciary Committee has not acted on the judicial appointments of a significant number of minority nominees (Blacks, 63.4% and whites, 11.5%). Blacks and whites are at virtual polar extremes on whether minority women lawyers are treated less fairly than white women lawyers in hiring and promotion. (Blacks, 66.5% and whites 10.9%).

[82] Aleinikoff, supra note 79, at 1068, citing Hamilton & Troiler, Stereotypes and Stereotyping: An Overview of the Cognitive Approach, in Prejudice, Discrimination, and Racism 127 (J. Dovidio & S. Gartner, eds. 1986). It is often more likely that our mental schema will influence how we understand new information than it is that the new information will alter our mental schema." Aleinikoff, supra note 79, at 1068.

[83] J. Jeter, A Comparative Analysis of the Programming Practices of Black-owned and White-owned Black-Oriented Radio Stations, 130, 139 (1981); FIFE, IMPACT OF MINORITY OWNERSHIP ON MINORITY IMAGES IN LOCAL TV NEWS (1986); FIFE, IMPACT OF MINORITY OWNERSHIP ON BROADCAST NEWS CONTENT: A MULTI-MARKET STUDY (1986); A recent survey revealed that shows most watched by whites are least watched by Blacks and vice-versa, finding a great divide in terms of both casts and audiences of popular shows. "A Racial Divide Widens on Network TV", N.Y. Times, December 29, 1998, A1.

recent empirical study conducted[84] showed a direct relationship between the ethnicity of the owner of a broadcast station and the choices of programs aired. The study concluded that minority ownership affects minority programming--Hispanic owners are more likely to program Spanish formats and target Hispanic listeners; Black owners are more likely to program Black formats and target Black listeners; and female owners are more likely to program women's formats and target women.[85]

Minorities and women serving as managers and supervisors in broadcast facilities help to ensure equal opportunity to other minorities and women to entry-level positions and for advancement to managerial positions. A recent empirical study demonstrates that Black subordinates with white supervisors experienced less supervisory support, less developmental opportunities, less procedural justice, assimilation, and higher levels of discrimination than Black subordinates with Black supervisors.[86]

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[84] Jeff Dubin & Matthew L. Spitzer, Testing Minority Preferences in Broadcasting, 68 S. Cal. L. Rev. 841 (May 1995).

[85] 68 So. Cal. L. Rev. at 866. The study did not purport to test the effects of minority managers who were not also owners and increases in a given type of programming. The Dubin/Spitzer study was preceded by an analysis of data prepared by the Congressional Research Service ("CRS") in 1988. The CRS concluded that station ownership by a particular type of minority, tended to increase the amount of programming targeted at that minority as well as at other minorities such as Hispanics, although station ownership by women produced a relatively small increase in programming for women when compared to the increase in programming that minority owners provide to minorities. CONGRESSIONAL RESEARCH SERVICE REPORT 21 (June 29, 1988).

[86] See S. Jeanquart-Barone, Implications of Racial Diversity in the Supervisor-Subordinate Relationship, 26 J. of Applied Social Psychology 935-

IV. Industry Trends Threatening Employment Opportunities

The National Telecommunications and Information Administration ("NTIA") 1998 survey of minority ownership of full power commercial radio and television stations shows an increase of only .1% from the previous year.[87] This news is discouraging not only because of the small increase but also because overall minority ownership has not kept pace with the developments within the industry as a whole, and Black ownership was losing ground, being at a lower level in 1998, than in 1994 and 1995.[88]

The NTIA identified several emerging trends which held the potential to further weaken minority broadcast ownership in the country, including increased competition in securing highly ranked nationally syndicated programming, attracting advertisers and earning sufficient advertising revenue, and in hiring and

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44 (June 1996). This study considered the impact of race on the supervisor-subordinate relationship, examining the relationship with minority subordinates reporting to both majority and minority group members. Five areas were considered: supervisory support, developmental opportunities, procedural justice, acceptance or assimilation, and discrimination.

[87] The survey reported that 165 minority broadcasters owned 337 of the 11,524 commercial radio and television stations in the United States.

[88] NTIA Study at 2-4. The report went on to describe several continuing trends. First, the increases in minority ownership totals were negligible when compared to increases in industry station totals. Of a total increase of 503 stations industry wide, minority ownership increased by only 15. Second, minorities own a significantly larger number of AM stations (189), than FM stations (116), although there are 867 more FM stations in the country. AM stations reach fewer listeners and on average generate less advertising revenues. Third, minorities own commercial radio stations that are located

personnel retention;[89] loss of minority owners, to a large extent from the increasing consolidation of broadcast interests;[90] and the increasing sales of the most established minority-owned television stations.[91] The inevitable result from these trends which the NTIA study points out is that "[a] significant loss in the number of minority broadcast owners may result in fewer employment opportunities for minorities in broadcasting and a less diverse broadcast media."[92] The barriers to success which the NTIA study identified are consistent with those found by a Congressional Committee in 1994. That committee found that minorities continued to have fewer opportunities to develop business skills and attitudes, to obtain necessary resources, and to gain experience, which are necessary for the success of small businesses in a competitive environment.[93]

At the entry level these barriers work to block initial entry into competitive markets by minorities and women as

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primarily in small markets. Minority ownership in the top markets is minimal and has declined in recent years.

[89] Id. at 2. The threat from shrinking advertisement revenues was convincingly proven by the Commission in an industry-wide study. "When Being No. 1 is Not Enough: The Impact of Advertising Practices on Minority-Owned & Minority-Formatted Broadcast Stations," A Report Prepared by the Civil Rights Forum on Communications Policy, submitted to the Office of Communications Business Opportunities, Federal Communications Commission (1999).

[90] Id. at 3. The 1998 survey indicates an overall loss of 17 owners.

[91] Id. at 3.

[92] Id. at 3.

[93] H.R. Rep. No. 870, 103d Cong., 2d Sess. 5 (1994). A history of discriminatory treatment by employers has prevented minorities once having gained entry from rising into the management positions that are most likely to lead to business ownership. Congress attributed this underrepresentation

owners. The same factors narrow opportunities for entry level employment in existing non-minority businesses. Even if entry level employment is obtained, biases and prejudices within majority-owned companies inhibit the advancement of minorities and women to managerial positions. The inability of minorities and women to obtain managerial experience and to establish relationships with managers in other companies, in turn raise and perpetuate the principal barriers to business ownership.

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to continued discriminatory conduct by employers, labor organizations, employment agencies and joint labor-management committees.

Conclusion

For the reasons stated in the Comments to which this Appendix is annexed and based upon the discussion presented here, the Commission should adopt the EEO Rule and Policies as described in the NPRM.

Respectfully submitted,

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On behalf of
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United Methodist Church, Ecumenical Office
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Black Citizens for a Fair Media

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